CHAPTER IV. THE FTCA CAUSE OF ACTION

Once an FTCA claimant has satisfied the administrative filing requirements, Title 28 U.S.C. § 1346(b) gives the federal courts:

> exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after 1 January 1945, for injury or loss of property, personal injury or death caused by negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[1]

Federal courts have extensively scrutinized several portions of this statutory language over the last four decades, while other portions of the law have posed few interpretive problems.

A. "MONEY DAMAGES . . . FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY OR DEATH"

This language waives government immunity for claims sounding in tort, and limits government liability to money damages.[2] The line between tort and contract causes of actions is sometimes unclear, but the general rule is that a court will reject an FTCA claim that stems

[1] 28 U.S.C. § 1346(b) (1994).

[2] People v. United States, 307 F.2d 941 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963) ; Ryan v. Cleland, 531 F. Supp. 724 (E.D.N.Y. 1982).

primarily from the failure of a government contractual arrangement.[3] Courts will likewise deny requests for restitution and injunctive or declaratory relief.[4]

B. "NEGLIGENT OR WRONGFUL ACT OR OMISSION"

The United States is liable under the FTCA for damages arising from acts or omissions considered tortious under controlling state law.[5] The substantive law of the state determines whether the plaintiff has a valid cause of action.[6] FTCA cases have applied state laws of *res ipsa loquitur*,[7] attractive nuisance,[8] last clear chance,[9] proximate cause,[10] and local statutory rules such as safe place statutes,[11] recreational use laws,[12] and scaffolding acts,[13] to define

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[3] *See, e.g.,* Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963); Aluetco Corp. v. United States, 244 F.2d 674 (3d Cir. 1957); Martin v. United States, 649 F.2d 701 (9th Cir. 1981).

[4] Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

[5] 28 U.S.C. §§ 1346(b), 2672 (1994). Klett v. Pim, 965 F.2d 587 (8th Cir 1992) (refusal by FmHA to grant farmer an operating loan is not a state tort).

[6] Henderson v. United States, 846 F.2d 1233 (9th Cir. 1988).

[7] Simpson v. United States, 454 F.2d 691 (6th Cir. 1972); Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); United States v. Johnson, 288 F.2d 40 (5th Cir. 1961); O'Connor v. United States, 251 F.2d 939 (2d Cir. 1958).

[8] Epling v. United States, 453 F.2d 327 (9th Cir. 1971).

[9] Peck v. United States, 195 F.2d 686 (4th Cir. 1952). *See generally* JAYSON, HANDLING FEDERAL TORT CLAIMS, § 9.05, (1998).

[10] Castillo v. United States, 552 F.2d 1385 (10th Cir. 1977); Dickens v. United States, 545 F.2d 886 (5th Cir. 1977).

[11] American Exchange Bank of Madison v. United States, 257 F.2d 938 (7th Cir. 1958).

[12] Hegg v. United States, 817 F.2d 1328 (8th Cir. 1987).

[13] Schmid v. United States, 273 F.2d 172 (7th Cir. 1959).

negligent or wrongful government conduct. The FTCA does not, however, permit recovery under a theory of strict or absolute liability. In *Laird v. Nelms*,[14] for example, a sonic boom from an Air Force jet damaged the plaintiff's home. North Carolina allowed recovery under a theory of absolute liability based on ultra hazardous activity. In reversing the lower court decision, the Supreme Court held that North Carolina's rule of strict liability was irrelevant because the FTCA required some negligent or wrongful act by a government employee as the basis of liability. The damage caused by the sonic boom was not negligently caused, so the plaintiff was not entitled to recover.

C. "EMPLOYEE OF THE GOVERNMENT"

Activities of the United States are conducted by individuals; therefore, United States tort liability is always derivative.[15] The FTCA makes the United States liable for the torts of an "employee of the government." Title 28 U.S.C. § 2671 defines "employee" as:

> Officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 316, 502, 503, 504, or 505 of title 32, U.S.C. and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.[16]

[14] 406 U.S. 797 (1972), *reh'g denied*, 409 U.S. 902 (1972).

[15] Schmid v. United States, 273 F.2d 172 (7th Cir. 1959).

[16] 28 U.S.C. § 2671 (1994).

A "federal agency" includes: "the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States."[17]

In most FTCA cases, the status of the tortfeasor as a government employee is undisputed. Several recurring situations, however, are worth considering.

1. Employees of nonappropriated fund instrumentalities (NAFIs).[18]

Some confusion has arisen over the torts of nonappropriated fund employees. Active duty service members assigned to duty with nonappropriated fund entities retain their status as federal employees for purposes of FTCA liability.[19] The courts also impose FTCA liability for the torts of employees paid by the NAFI itself.[20] There is, however, a distinction between employees and members of certain NAFIs; the United States will be liable for torts committed by employees, but not for those committed by mere members.[21] The United States is also not

[17] *Id*.

[18] For a definition of nonappropriated fund instrumentalities, *see* AR 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 September 1995).

[19] Mariano v. United States, 444 F. Supp. 316 (E.D. VA, 1977), *aff'd*, 605 F.2d 721 (4th Cir. 1979); Roger v. Elrod, 125 F. Supp. 62 (D. Alaska 1952).

[20] Gonzales v. United States, 589 F. 2d 465 (9th Cir. 1979); Rizzuto v. United States, 298 F.2d 748 (10th Cir. 1961); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960).

[21] To encourage participation in NAFI activities, claims that arise from the use of certain types of NAFI property, *i.e.*, flying clubs, golf clubs, and craft shops, are paid even though the user is not an employee as defined by the FTCA. These claims are paid under AR 27-20, chapter 12, from NAFI funds. This now includes Family Care Providers.

liable for the acts of private organizations on military installations, nor the acts of their employees.[22]

2. Independent contractors.

The FTCA excludes government liability for the acts of independent contractors. Much of the government's construction and manufacturing work is performed pursuant to contracts with private enterprise. Quite often the work is performed on government property where federal employees have contract supervision or liaison responsibilities with the contractor. The employee typically receives workers' compensation for injuries suffered in the course of employment, which is the employee's exclusive remedy against the employer. Many injured employees consider workers' compensation an inadequate remedy and look to the United States as an additional, deep-pocket source of revenue.

The FTCA waives the sovereign immunity of the United States only for acts of "employees" of a "federal agency." 28 U.S.C. § 2671 excludes from the definition of agency "any contractor with the United States." Neither the acts of the contractor nor its employees may, therefore, impose liability on the United States under the FTCA. In practice, however, courts have limited the "contractor" language to the "independent contractor" test derived from the law of agency.[23] While many factors determine who is an employee (for whose negligence

[22] *See* Dubois v. United States, Civ. # 93-45-COL (M.D. Ga., June 8, 1994) (Officers Wives Club is sued individually for slip and fall by patron at its furniture barn--jury verdict for Club); Scott v. United States, 337 F.2d 471 (5th Cir. 1964), *cert. denied,* 380 U.S. 933 (1965). For a definition of private organizations, *see* AR 210-1, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS (14 September 1990).

[23] RESTATEMENT (SECOND) OF AGENCY § 220, (1958): "Definition of a servant. (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the

the United States might be liable) and who is an independent contractor (for whose negligence the government is not liable), the most significant test is government control over the contractor.[24]

Certain relationships between a private business and the government may involve dual capacity. One individual may be "employed" with separate responsibilities as an independent contractor and as an employee.[25] A second situation might involve differing degrees of government control over separate aspects of the same job.[26] In each situation the claims officer must isolate the portion of work out of which the claim arose. If an employer-employee relationship is present, the government may be held liable. If the injury was caused by an independent contractor, the government is not liable.

Three issues that often arise in contractor cases deserve closer examination.

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performance of the services is subject to the other's control or right of control. (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) method of payment, whether by the time or by the job; (h) whether or not the parties believe they are creating the relationship of master and servant; and (j) whether the principal is or is not in business."

[24] Starnes v. United States, 139 F.3d 540 (5th Cir. 1998) (Military physician in residency training agreement at civilian hospital is not a borrowed servant but a United States employee); Palmer v. Flaggman, 93 F.3d 196 (5th Cir. 1996) (USAF physician completing residency in private hospital is an employee of both the United States and private hospital under Texas law); Williams v. United States, 50 F.3d 299 (4th Cir. 1995) (U.S. government was not liable for actions of contract janitorial service employees in building leased by the United States); Berkman v. United States, 957 F.2d 108 (4th Cir. 1992) (operator of mobile lounge at Dulles Airport is not U.S. employee, but independent contractor); Bird v. United States, 949 F.2d 1079 (10th Cir. 1991) (nurse anesthetist hired from placement service to serve in a federal hospital was a federal employee); Leone v. United States, 910 F.2d 46 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (private physicians designated as Aviation Medical Examiners by the Federal Aviation Administration are not federal employees); United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973); Brooks v. A.R. & S. Enterprises, 622 F.2d 8 (1st Cir. 1980); Smith v. United States 688 F.2d 476 (7th Cir. 1982).

[25] Marcum v. United States, 324 F.2d 787 (6th Cir. 1963).

[26] Maloof v. United States, 242 F. Supp. 175 (D. Md. 1965).

a. Government employees' negligence. A specific job performed by an independent contractor does not excuse federal liability under the FTCA for torts committed by government employees during the performance of the contractor. Government contracting officers, supervising engineers, safety directors, inspectors, and others perform federal functions during the performance of most contracts. The United States may be liable for negligent direction of contractor personnel,[27] the provision of dangerous implements for conduct of work,[28] or failure to provide a safe place for the contractor's employees to work.[29]

b. Exercise of control. The Supreme Court in *United States v. Logue*[30] indicated the significance of the exercise of control in deciding contractor cases. In *Logue* a federal prisoner was placed in a county jail pursuant to a contractual arrangement. The prisoner committed suicide during a period of negligent supervision by the county jailers. The Court refused to hold the United States liable for the negligence of the county jailers. Federal employees did not control the day-to-day activities of the jail; therefore, the jail was an independent contractor.

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[27] Hardaway v. U.S. Corps of Engineers, 980 F.2d 1415 (11th Cir. 1992), *cert. denied,* 510 U.S. 820 (1993) (failure to investigate financial worth of contract and require posting of Miller Act bond in violation of COE regulation is not a state tort); United States v. Babbs, 483 F.2d 308 (9th Cir. 1973); Anderson v. United States, 259 F. Supp. 148 (E.D. Pa. 1966).

[28] Flynn v. United States, 631 F.2d 678 (10th Cir. 1980); Benson v. United States, 150 F. Supp. 610 (N.D. Cal. 1957).

[29] Wiseman v. United States, 327 F.2d 701 (3d Cir. 1964); Tatum v. United States, 499 F. Supp. 1105 (M.D. Ala. 1980).

[30] 412 U.S. 521 (1973). *See also* Brown v. United States, 486 F.2d 284 (8th Cir. 1973).

Many claimants have unsuccessfully attempted to show that the exercise or right to exercise some government control is sufficient to show federal liability.[31] A contract reservation that contractor personnel meet certain qualifications is also generally insufficient to establish government control.[32] Promulgation and enforcement of government safety regulations also do not constitute sufficient government control.[33] Detailed and extensive instructions in performing work may, however, amount to government control and overcome an independent contractor's status.[34]

c. Nondelegable duty. Under agency law, a principal may not avoid liability for a breach of a "nondelegable duty" by hiring an independent contractor to perform the work.[35] The degree of control by the principal is irrelevant. Such nondelegable duties typically arise from the performance of inherently dangerous activities or from the manner in which buildings and grounds are maintained.[36] The FTCA requirement of a negligent or wrongful act by a

[31] *See, e.g.*, Berkman v. United States, 957 F.2d 108 (4th Cir. 1992) (insufficient U.S. control over operator of mobile lounge at Dulles Airport); Cavasos v. United States, 776 F.2d 1263 (5th Cir. 1985).

[32] Buchanan v. United States, 305 F.2d 738 (8th Cir. 1962); Dushon v. United States, 243 F.2d 451 (9th Cir. 1957).

[33] Lathers v. Penguin Indus. Inc., 687 F.2d 69 (5th Cir. 1982); Campbell v. United States, 493 F.2d 1000 (9th Cir. 1974); United States v. Page, 350 F.2d 28 (10th Cir. 1965), *cert. denied*, 382 U.S. 979 (1966).

[34] Maryland *ex rel.* Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949); Schetter v. Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955).

[35] RESTATEMENT (SECOND) OF AGENCY § 214 (1958); PROSSER, HANDBOOK ON THE LAW OF TORTS 470 (4th ed. 1971).

[36] Dickerson Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989) (Florida nondelegable duty statute applied to PCB disposal); Campbell v. United States, 493 F.2d 1000 (9th Cir. 1974) (state does not recognize extrahazardous doctrine); Jeffries v. United States, 477 F.2d 52 (9th Cir. 1973); Sexton v. United States, 797 F. Supp. 1292 (E.D. N. Car. 1991) (United States owed nondelegable duty to warn employee of subcontractor of danger of weak door in metal grate); Orr v. United States, 486 F.2d 270 (5th Cir. 1973); Emelwon Inc. v. United States, 391 F.2d 9 (5th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); Stancil v. United States, 196 F. Supp. 478 (E.D. Va. 1961).

government employee,[37] however, supersedes state law requirements that equate to strict liability against the United States.[38] Seldom will liability be imposed upon the United States without proof of a negligent or wrongful act by a government employee.[39]

D. "ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT"

The FTCA imposes liability on the government only for negligent acts by employees who are acting within the scope of their employment. The "scope of employment" clause is the "very heart and substance" of the FTCA. Its inclusion as one of the elements of an FTCA cause of action demonstrates clear Congressional intent to limit the liability of the United States under the doctrine of *respondeat superior*.[40] While federal law controls the question of whether someone is "an employee of the government," a 1955 Supreme Court decision held that scope of employment issues are decided under "the law of the place where the act or omission occurred."[41] State law, therefore, governs the scope of employment question.

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[37] 28 U.S.C. § 2671; Laird v. Nelms, 406 U.S. 797 (1972), *reh'g denied*, 409 U.S. 902 (1972).

[38] Savic v. United States, 918 F.2d 696 (7th Cir. 1990), *cert. denied*, 502 U.S. 813 (1991) (no U.S. employee in charge of work leads to no FTCA liability); Thorne v. United States, 479 F.2d 804 (9th Cir. 1973); Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); Fried v. United States, 579 F. Supp. 1212 (N.D. Ill. 1983).

[39] *See, e.g.*, Logue v. United States, 412 U.S. 521 (1973) (rejecting the nondelegable duty concept of liability in the absence of a negligent act by a government employee).

[40] United States v. Campbell, 172 F.2d 500 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949).

[41] Williams v. United States, 350 U.S. 857 (1955); *see also* Haddon v. United States, 68 F.3d 1420 (D.C. Cir. 1995); Hallett v. United States, 877 F. Supp. 1423 (D. Nev. 1995); Hall v. Green, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 513 U.S. 809 (1994); Flechsig v. United States, 991 F. 2d 300 (6th Cir. 1993); Forrest City Machine Works, Inc. v. United States, 953 F.2d 1086 (8th Cir. 1992); Kelly v. United States, 924 F.2d 355 (1st Cir. 1991).

Consequently, the outcome of cases with similar facts may vary considerably from jurisdiction to jurisdiction.

The law on the scope of employment varies from state to state, but the issue usually turns on: (1) control exercised by the employer over its employee, and (2) the degree to which the employer's purposes are being served at the time of the incident.[42] The FTCA defines "scope of employment" for military personnel as "acting in the line of duty,"[43] which dictates certain benefits payable to an injured or killed service member. These benefits can accrue, however, even though the injury, death, or disease results from a purely personal pursuit. Courts have rejected this expansive definition; whether the negligent actor is military or civilian, an FTCA plaintiff must prove the same "scope of employment" and not simply that the soldier was acting within the "line of duty."[44]

Three particularly common and troublesome "scope of employment" issues concern intentional wrongful conduct, use of government vehicles, and off-duty personal activities governed by military regulations.

1. Intentional wrongful conduct.

Intentional wrongful conduct on the part of an employee does not preclude a finding that the employee was acting within the scope of employment. If, at the time of the incident giving rise to the claim, the employee was performing the employer's work rather than acting out of

[42] *See generally* RESTATEMENT, (SECOND) OF AGENCY §§ 228, 229 (1958); PROSSER AND KEETON, HANDBOOK ON THE LAW OF TORTS 460 (7th Ed. 1989).

[43] 28 U.S.C. § 2671 (1994).

[44] Williams v. United States, 350 U.S. 857 (1955); Hartzell v. United States, 786 F.2d 964 (9th Cir. 1986).

personal motives unrelated to the furtherance of the employer's business, the employee's acts, even if intentionally wrongful, are within the scope of employment.[45] If, however, the employee's acts are so outrageous, criminal, and far removed from the government's business that the acts could not reasonably have arisen from the performance of duty, the intentional misconduct will not be considered within the scope of employment, even though it occurs concurrent with other duty functions.[46]

2. Use of government vehicles.

The scope of employment question often arises in the military in cases involving the use of vehicles. Since the scope of employment turns on state law principles, courts have reached very different results in factually similar cases. Though the cases defy reconciliation because of the different legal principles governing different jurisdictions, many common arguments arise during their presentation.

a. Government-owned vehicles. Many states follow the rule that in an action caused by the negligent operation of a motor vehicle, proof that the defendant employer owned

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[45] *See, e.g.*,, Williams v. United States, 71 F.3d 502 (5th Cir. 1995) (defamatory remarks made by Congressman during an interview within the scope of employment); Red Elk v. United States, 62 F.3d 1102 (8th Cir. 1995) (rape perpetrated by a police officer transporting a curfew violator to her home within the scope of employment); Tonelli v. United States, 60 F.3d 492 (8th Cir. 1995) (postal worker's actions in opening and pilfering first class mail in violation of federal law and post office procedures within the scope of employment).

[46] Bates v. United States, 517 F. Supp. 1350 (1981), *aff'd*, 701 F2d 737 (8th Cir. 1983) (military policeman's actions in kidnapping four teenagers, raping two, murdering three, and attempting to murder the fourth while on duty were not within the scope of employment because conduct was so outrageous, criminal, and excessively violent that it could not reasonably have arisen from the performance of his duty).

the vehicle in question establishes a *prima facie* case that the vehicle was being operated within the scope of employment. This presumption, however, is rebuttable,[47] and often fails if the employee's actions while using the vehicle were purely personal in nature.

Similarly, when a government vehicle is taken without permission, the driver is almost universally held to have been acting outside of the scope of employment. Since a vehicle taken without permission is usually taken for purely personal motives, the driver's "mission" has no connection with government business. The driver's status is, therefore, that of a mere borrower. A master-servant relationship does not exist with respect to the use. Consequently, the government is not liable for its employees actions under such circumstances.[48] If, however, the government is negligent in exercising custody over its vehicles, or entrusts or dispatches a vehicle to an employee when it is foreseeable that the employee may take the vehicle for a personal purpose, the United States could be liable under the FTCA for injuries or deaths

[47] Keener v. Department of the Army, 498 F. Supp. 1309 (M.D. Pa. 1980), *aff'd*, 659 F.2d 1068 (3d. Cir. 1981) (presumption rebutted-Army sergeant using a government vehicle to get something to eat); Simpson v. United States, 484 F. Supp. 387 (W.D. Pa. 1980) (applying Pennsylvania law - presumption not rebutted); Erwin v. United States, 445 F.2d 1035 (10th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971) (presumption rebutted - VISTA employee using a government vehicle to drive to the airport to catch a plane for vacation (Oklahoma law)); Pacheco v. United States, 409 F.2d 1234 (3d Cir. 1969) (applying Virgin Islands law - directed verdict for United States reversed because proof of government ownership of truck raised a presumption that driver was acting within scope); Hardy v. United States, 304 F. Supp. 855 (N.D. Ga. 1969) (applying Georgia law - government summary judgment request denied because of presumption); Tomack v. United States, 369 F.2d 350 (2d Cir. 1966) (presumption rebutted - Small Business Administration employee using an agency car to attend a relative's funeral (New York law)); Baker v. United States, 159 F. Supp. 925 (D.D.C. 1958), *aff'd*, 265 F.2d 123 (D.C. Cir. 1959) (presumption not rebutted - service member using Army vehicle to get a haircut).

[48] Coto Orbeta v. United States, 770 F. Supp. 54 (D.P.R. 1991) (service member took a government vehicle and drove home upon learning that his wife had been involved in an accident - nonscope); White v. Hardy, 678 F.2d 485 (4th Cir. 1982) (service member on 24-hour duty took a government vehicle without permission and left the command post to make a personal telephone call, staying away for several hours - nonscope); Concepcion v. United States, 374 F. Supp. 1391 (D. Guam 1974) (off-duty service member drove another service member on a personal errand in a government vehicle which the former normally used for duty purposes - nonscope); LeFerve v. United States, 362 F.2d 352 (5th Cir. 1966) (National Guardsman dispatched a government owned jeep to himself to retrieve a sunken boat for his personal use - nonscope).

arising from the unauthorized use of the vehicle. If the act of entrustment or dispatch is itself outside of the scope of employment, the United States is not liable.

When a government vehicle is taken with permission, but used by the driver on a personal frolic, the United States will normally concede that the vehicle was properly dispatched for government purposes. Nevertheless, the United States will argue that the driver made a detour or deviation that rendered the vehicle's use outside of the scope of employment. Here, more than in any other category of "scope of employment" cases, the outcome is highly dependent on local law and the particular facts of a given situation. Two cases are illustrative of the different outcomes possible.

In *Fitzpatrick v. United States*,[49] the tortfeasor, SFC Davis, was assigned to Fort Meade, Maryland. As senior medical sergeant, his duties included traveling to Delaware to train National Guard units in the proper operation of a military medical unit. For such travel, SFC Davis was given a government vehicle and was authorized to make his own arrangements for food and lodging.

On one trip, SFC Davis arrived in Delaware, rented a motel room, and then went to the training location to look for the training NCO. Unable to locate the training NCO, SFC Davis went to the officer's club to find the unit executive officer. The executive officer was not at the club. Nevertheless, SFC Davis stayed for approximately three and a half hours. During this time he had several drinks, socialized, and played pool. After leaving the club and while driving back to his motel, SFC Davis rear-ended a car stopped at a traffic light. He was subsequently arrested and charged with Driving Under the Influence of Alcohol.

[49] 754 F. Supp. 1023 (D. Del. 1991).

Applying Delaware law, the District Court held that SFC Davis was within the scope of his employment at the time of the accident. The court relied on the facts that (1) SFC Davis was authorized to obtain overnight accommodations in accordance with his duty in Delaware; (2) the duty in Delaware was given to SFC Davis by his employer, the United States Army; (3) SFC Davis' purpose for being in Delaware was to serve his employer by conducting training; and (4) in order for SFC Davis to satisfy this purpose, it was necessary for him to obtain overnight accommodations. Using the moment of the accident as a focal point, the court found SFC Davis' actions within the scope of employment because, at that moment, he was en route to the motel accommodations that he was authorized to obtain in accordance with his temporary duty assignment in Delaware.

Conversely, in *Cronin v. Hertz Corporation*,[50] the actions of the tortfeasor, Thomas Hull, a Navy civilian on temporary duty, were found to be outside of the scope of employment. Mr. Hull was stationed at Pearl Harbor, Hawaii. In August 1980, he and several other employees were assigned to temporary duty in Connecticut to attend training. Pearl Harbor personnel made lodging and rental car arrangements for the group. The travelers were to be reimbursed for their expenses on a per diem basis using United States funds.

One night during the temporary duty period, Mr. Hull took one of the rental vehicles to do some grocery shopping. After he finished shopping, he stopped at a bar and stayed for approximately four hours. After leaving the bar and while on his way back to the motel, Mr. Hull collided with a motorcycle and severely injured the rider. When he was arrested, Mr. Hull had a BAC of 1.4.

[50] 818 F.2d 1064 (2d Cir. 1987).

Applying Connecticut law, the District Court ruled that Mr. Hull was not acting within the scope of his employment at the time of the accident. The court rejected the argument that persons on temporary duty are always within the scope of their employment. While conceding that Mr. Hull's return to the motel was at least in part motivated by his employer's interests in getting Mr. Hull and his coworkers to training the next day, the court did not view such motivation as determinative. The court found that the risk of this type of accident was not one that could fairly be regarded as typical or incidental to Mr. Hull's employment. The court also noted that the accident did not occur within a time period which would render it within the scope of employment.

b. Employees using their own vehicles. Ownership of the vehicle involved in an accident is only one of the many factors that must be considered in resolving the scope of employment question in vehicle accident cases. The United States may be liable in some cases involving vehicles owned by its employees. Among the factors considered to determine whether an employee driving a privately-owned vehicle is within the scope of employment are the following: (1) was the use of the privately owned vehicle authorized; (2) was the employee engaged in government business at the time of the accident; (3) did the government exercise or have the right to exercise control over the employee in the use of the vehicle; (4) did the employee deviate sufficiently from assigned duties to take him out of the scope of employment; and (5) was the employee's trip undertaken primarily for the benefit of the government, or was the trip at least as beneficial to the government as it was to the employee.[51]

[51] *See* RESTATEMENT, (SECOND) OF AGENCY § 239 (1958); JAYSON, HANDLING OF FEDERAL TORT CLAIMS, § 9.07[3] (1998).

The cases are not fully in accord as to the role played by the element of control. Some courts hold that once the master-servant relationship has been established, it is not necessary to show that the master had the right to control the details by which its directions were accomplished.[52] Others decline to impose liability unless control is shown.[53] As is true of all "scope of employment" cases, applicable state law and the particular facts of each case will determine the outcome. Results will vary considerably from jurisdiction to jurisdiction.[54]

Arguably the most troublesome of the "scope of employment" cases are the "change-of-station" cases. In applying the varying laws of the applicable jurisdictions and considering the differing factual circumstances presented by each case, courts have reached divergent results. *Cooner v. United States*,[55] is illustrative of the problem. Although *Cooner* is an older case, it

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[52] *See, e.g.*, Hinson v. United States, 257 F.2d 178 (5th Cir. 1958).

[53] *See, e.g.*, James v. United States, 467 F.2d 832 (4th Cir. 1972).

[54] For in scope cases *see, e.g.*, Chadwick v. Blanton, Civ. # 1:97-CV-1350-ODE (N.D. Ga., 26 Jan. 1998) (reservist driving his POV home from 2-week ADT is within scope); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995); Purcell v. United States, 130 F. Supp. 882 (N.D. Cal. 1955) (Air Force officer proceeding by POV from his post to attend a staff meeting in another city was within scope. Second Circuit rejected government argument that the officer was not subject to its control at the time of the accident); Hopper v. United States, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd*, 214 F.2d 129 (6th Cir. 1954) (service member who, although furnished with a government car for travel, used his own car to attend a conference on recruiting activities, was within scope); Maraquardt v. United States, 115 F. Supp. 160 (S.D. Cal. 1953) (Corps of Engineers employee within scope while using POV to travel to a military base in connection with his work, even though the accident occurred during the first three days of the employee's trip while he was on leave to attend his son's graduation). For out of scope cases *see, e.g.*, Vuevas v. Harris, 2 F. Supp. 189 (D. P.R. 1998) (Navy officer drives POV to main base to have lunch. She intends to deliver official files but forgets them. On return, she has accident on public road – no scope); Frazier v. Nabors, 412 F.2d 22 (6th Cir. 1969) (Forest Service employee traveling in his own vehicle on a house hunting trip at his new duty station was not within scope); Hall v. Green, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 513 U.S. 809 (1994) (reservists who drove their own car off base to eat breakfast and pick up donuts for other reservists were out of scope); Daughtery v. United States, 427 F. Supp. 222 (W.D. Pa. 1977) (driving home in POV at end of duty day not within scope); Perez v. United States, 368 F.2d 320 (1st Cir. 1966) (driving to post in POV at start of duty day was not within scope); Holloway v. United States, 829 F. Supp. 1327 (M.D. Fla. 1993), *aff'd*, 26 F.3d 1121 (11th Cir. 1994) (Naval Reserve officer driving his POV home from site of his inactive duty training was not in scope).

[55] 276 F.2d 220 (4th Cir. 1960).

is extremely useful in that its majority and dissenting opinions highlight the factors that are typically argued on both sides of the issue.

Major Miller, an Army officer stationed at Fort Leavenworth, Kansas, received orders to report to Washington, D.C. for three days of temporary duty en route to his permanent duty station in Ottawa, Canada. MAJ Miller's orders provided that (1) his travel was deemed necessary for his military service; (2) he was permitted to use whatever suitable mode of transportation he desired, including his own automobile; and (3) he would be reimbursed six cents per mile for the use of his own automobile.

MAJ Miller reported to his temporary duty station in Washington, D.C., where he spent three days as required. He then proceeded to Ottawa, accompanied by his family, driving his own vehicle, and using a direct route. While passing through New York, he had an accident in which he and the driver of another vehicle were killed.

Applying New York law, the majority held that MAJ Miller was acting within the scope of employment at the time of the accident. The court held that under New York law, the question of scope depended on whether MAJ Miller was operating his vehicle with the Army's consent in furtherance of its business, and not whether the details of driving were subject to the Army's control. In finding that MAJ Miller was using his vehicle in furtherance of the Army's business, and therefore acting within scope, the court relied on the following factors: (1) MAJ Miller was proceeding from one duty station to another on specific orders issued by the Army; (2) he drove on a direct route, making no detour for personal affairs; (3) the Army specifically authorized MAJ Miller's use of his own vehicle; (4) the Army was to reimburse MAJ Miller for using his vehicle; (5) he was not on leave or pass, but on what the Army termed "official travel;" (6) MAJ Miller's trip was deemed necessary for his military service by express language in the

travel orders; and (7) MAJ Miller was subject to disciplinary action under the UCMJ if he drove recklessly during his trip.

The dissent, on the other hand, concluded that MAJ Miller was outside of the scope of employment at the time of the accident. It pointed out that the majority was wrong to focus on the fact that MAJ Miller's work necessitated his travel to Canada. In its view, the critical issue was the relation of MAJ Miller's personal automobile to his employment. This involved examining the right of the Army, in its role as employer, to control the vehicle's operation during the trip. The dissent noted that although the Army may have authorized MAJ Miller's use of his private vehicle, it did not direct or otherwise assume control over the manner in which it was used. Other factors relied on by the dissent included: (1) the Army had not directed MAJ Miller to use any particular mode of travel and was indifferent to the means he chose; (2) MAJ Miller's normal duties as an Army officer did not involve driving vehicles; (3) MAJ Miller's use of his automobile was a single occurrence as opposed to regular or routine use; (4) the statement in MAJ Miller's orders that the travel was deemed necessary for his military service added nothing to the order, but was solely for MAJ Miller's benefit since it allowed him to obtain reimbursement for travel expenses; and (5) the UCMJ's proscription against reckless driving is a broad mandate that does not constitute the degree of detailed control necessary to render the United States liable under *respondeat superior* principles.

3. Off-duty personal activities governed by military regulations.

The Ninth Circuit has expanded the concept of scope of employment in several cases involving military regulations that encompass certain off-duty personal activities. The thrust of

these cases is that the scope of employment includes performance of duties directly or indirectly associated with normal and regular military activities. Thus, where installation regulations assign responsibilities that can properly be characterized as military activities, such as safety and security functions, the matters regulated are within the scope of employment. This concept is illustrated in *Lutz v. United States*.[56]

The plaintiff in *Lutz* brought suit on behalf of her two-year old daughter, who was severely injured by dog bites while residing in base housing at Malmstrom Air Force Base. Plaintiff's neighbor allowed his dog, a wolf-malamute cross named Satan, to roam free on the installation, despite a local regulation requiring residents of base housing to control and leash their pets. The plaintiff claimed that the dog's owner was negligent in failing to control the animal as required by regulations, and that the failure to observe the regulation constituted a negligent act within the scope of employment for which the United States should be liable. The District Court found that the United States was not liable, but the Ninth Circuit reversed.

The Ninth Circuit held that the regulation was a delegation to dog owners of partial responsibility for base security functions. It further found that the regulation assigned mandatory, affirmative security duty on dog owners to protect the health and safety of all base residents by controlling their animals. Because base security is a regular military function, the obligation to control a dog was held to be within the scope of the dog owner's employment, even though the lapse in control occurred during off-duty hours.

[56] 685 F.2d 1178 (9th Cir. 1982).

Using a similar analysis, the Ninth Circuit in *Washington v. United States*,[57] held that Navy service members were acting within the scope of employment when, using an open can of gasoline, they tried to prime the carburetor of an automobile located in the garage of a naval housing unit. The service members' actions violated Navy fire regulations imposed for the benefit of the Navy on personnel residing in naval housing units. The fact that the service members were on liberty at the time did not relieve them of a continuing duty to comply with regulations.

Another example of this reasoning is found in *Doggett v. United States*.[58] In that case the Ninth Circuit held that Navy petty officers were acting within the scope of their employment when they negligently failed to prevent an enlisted member from driving while intoxicated. Applicable Navy regulations imposed a mandatory duty to detain intoxicated personnel. The court characterized the regulation as a security regulation comparable to the one at issue in *Lutz*.

Other circuit and district courts have rejected the Ninth Circuit's reasoning in these types of cases.[59] These courts have emphasized that "scope of employment" requires that an employee act in furtherance of his employer's interest. Duties imposed by regulations like those at issue in *Lutz, Washington*, and *Doggett* were not imposed by the government in its role as employer, but, rather, to enhance community life and to benefit all residents of the installation.

[57] 868 F.2d 332 (9th Cir. 1989), *cert. denied*, 493 U.S. 992 (1989).

[58] 875 F.2d 684 (9th Cir. 1989).

[59] Stanley v. United States, 894 F. Supp. 636 (W.D.N.Y. 1995) (dog-bite case); Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993) (dog-bite case); Piper v, United States, 887 F.2d 861 (8th Cir. 1989) (dog-bite case); Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988) (dog-bite case).

These regulations cover ancillary matters and do not concern activities of service member "in line of duty."[60]

E. "UNDER CIRCUMSTANCES WHERE THE UNITED STATES, IF A PRIVATE PERSON, WOULD BE LIABLE"

Early Supreme Court cases have limited litigation over this language. A claimant need not identify an identical activity by a private individual to recover from the United States. No private individual runs an Army, for example. The Supreme Court has held, however, that the statutory language "under circumstances" does not mean "under the same circumstances."[61] The Court has also rejected the argument that federal government liability should be limited by principles of municipal liability, which involve difficult distinctions between "governmental" and "proprietary" functions. Such arbitrary distinctions are contrary to the intent of Congress; therefore, the government is liable for "proprietary" functions such as negligent firefighting,[62] and improper operation of a lighthouse.[63] The plaintiff must, however, prove a duty under state law. No cause of action against the government will arise unless state law would allow recovery under the circumstances.[64]

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[60] Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988) (duty imposed on service members by base regulations to control pets was not a duty within the employer-employee relationship).

[61] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[62] Rayonier, Inc. v. United States, 352 U.S. 315 (1957).
[63] Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[64] Cole v. United States, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988) (no liability for failure to warn when there is no similar duty under state law); Corrigan v. United States, 815 F.2d 954 (4th Cir.), *cert. denied*, 484 U.S. 926 (1987) (no liability for serving alcohol to drunk soldier when state law does not recognize dram shop liability).

F. "IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED"

The 1962 Supreme Court decision in *Richards v. United States*[65] clarified the proper choice of law analysis under the FTCA. In *Richards*, negligence of the Federal Aviation Administration in Oklahoma caused an airplane crash in Missouri. Missouri and Oklahoma differed on the damages recoverable in wrongful death actions. In interpreting the "law of the place where the act or omission occurred," the Court announced a two-step rule. First, consider the whole law (including choice of law principles) of the place of the negligent act. Next consider any law under that state's choice of law rules. Since Oklahoma treated the place of the injury as significant in *Richards*, the Missouri wrongful death statute applied. The outcome would have been different if Oklahoma followed a different choice of law rule.

Just as the United States is liable under the "law of the place" doctrine, it also enjoys the benefits of all state law defenses that defeat or diminish liability. These defenses apply only when a plaintiff has stated a claim that would impose liability upon a private party under similar circumstances.[66] Once the claimant has established the breach of state law duty, state law defenses such as limits on noneconomic damages,[67] recreational use statutes,[68] and statutory

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[65] 369 U.S. 1 (1962).

[66] Johnson v. Sawyer, 4 F.3d 369 (5th Cir. 1993); Henderson v. United States, 846 F.2d 1233 (9th Cir. 1988); Gammill v. United States, 727 F.2d 950 (10th Cir. 1984). *See also* JAYSON, HANDLING FEDERAL TORT CLAIMS, § 9.05[2][C] (1998).

[67] Starns v. United States, 923 F.2d 34 (4th Cir. 1991); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988).

[68] Mansion v. United States, 945 F.2d 1115 (9th Cir. 1991), *cert. denied*, 502 U.S. 809 (1991); Hegg v. United States, 817 F.2d 1328 (8th Cir. 1987).

employer laws[69] apply to reduce or eliminate the government's liability. Because of the pervasive nature of government regulations--especially in the military--some claimants seek to impose liability upon the government for violations of regulations.[70] The courts have rejected this theory unless the state tort law imposes an analogous duty on private parties.[71]

The courts have also applied the "law of the place" doctrine to limit government liability based on state laws of trespass,[72] proximate cause,[73] failure to warn,[74] and false arrest.[75] If there is a valid state cause of action, however, there may still be a statutory defense to the cause of action within the FTCA.

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[69] Insurance Co. of N. Am. v. United States, 643 F. Supp. 465 (M.D. Ga. 1986).

[70] Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988); Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993); Piper v. United States, 887 F.2d 861 (8th Cir. 1989).

[71] Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993); Crider v. United States, 885 F.2d 294 (5th Cir. 1989), *cert. denied,* 495 U.S. 965 (1990) (Texas law imposes no duty on Park Rangers to restrain intoxicated driver from driving); Doggett v. United States, 858 F.2d 555 (9th Cir. 1988); Chen v. United States, 854 F.2d 622 (2d Cir. 1988); Cecile Indus., Inc. v. United States, 793 F.2d 97 (3d Cir. 1986); Moody v. United States, 774 F.2d 150 (6th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986).

[72] Henderson v. United States, 846 F.2d 1233 (9th Cir. 1988).

[73] Skipper v. United States, 1 F.3d 349 (5th Cir. 1993), *cert. denied,* 510 U.S. 1178 (1993).

[74] Cole v. United States, 846 F.2d 1290 (11th Cir. 1988), *cert. denied,* 488 U.S. 966 (1988).

[75] Bernard v. United States, 25 F.3d 98 (2d Cir. 1994).